IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Michels Corporation,

Plaintiff,

v.

Central States, Southeast and Southwest Areas Pension Fund, *et al.*,

Defendants.

Pipe Line Contractors Association,

Intervening Plaintiff,

v.

Central States, Southeast and Southwest Areas Pension Fund, *et al.*,

Defendants.

Central States, Southeast and Southwest Areas Pension Fund, and Arthur H. Bunte, Jr.,

Counterclaim Plaintiffs,

v.

Michels Corporation, et al.

Counterclaim Defendants.

Case No. 12-cv-4144

Judge Charles Norgle

CENTRAL STATES' MEMORANDUM IN OPPOSITION TO MOTION FOR ATTORNEYS' FEES

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ERISA is a remedial statute designed to protect the interests of employees (not employers) and encourage actions to vindicate those interests. Because the fee-shifting provision of ERISA must be enforced with this objective in mind, the courts have repeatedly indicated that a fee award against an ERISA plaintiff is disfavored since an award may chill enforcement actions and reduce the corpus of the trust to the detriment of the employees ERISA is designed to protect. This case is not one of the rare cases where a fee award against an ERISA plaintiff is appropriate because the Fund's position that the 2006 CBA had not terminated based upon extension agreements reciting that the 2006 CBA was being "extended," although ultimately rejected by the Seventh Circuit, had substantial merit. The substantial merit of the Fund's position is established by the fact the Fund's position satisfied this court, which granted the Fund's summary judgment motion and the Movants' assertion in their brief that this was "a complex ERISA action involving significant legal issues and substantial amounts [of money]."

I. MICHELS IS THE ONLY PARTY POTENTIALLY ENTITLED TO FEES.

Michels Corporation and 31 other employers named in the Fund's counterclaim as well as the Pipe Line Contractors Association (hereinafter collectively referred to as "Movants" and individually as "Michels," the "Other Employers" or the "PLCA") seek a discretionary fee award under ERISA §502(g)(1), which provides:

> In any action under this subchapter (other than an action described in paragraph (2)) by a participant, beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorney's fee… to either party.

The Movants do not seek fees for the period from the filing of Michels' declaratory judgment complaint on March 15, 2012 through the August 1, 2012 filing of the Fund's counterclaim

because the Seventh Circuit indicated that jurisdiction over Michels' declaratory judgment complaint and the declaratory judgment complaint later filed by the PLCA was based solely on §301 of the LMRA, which does not contain a fee shifting provision. *Michels Corp. v. Cent. States, Se. & Sw. Areas Pen. Fund*, 800 F.3d 411, 415 (7th Cir. 2015). The Declaratory Judgment Complaints did not arise under ERISA because §502 "limits the right to sue to plan participants and beneficiaries [and s]ince employers are neither, *Giardono v. Jones*, 867 F.2d 409, 412-13 (7th Cir. 1989), [an employer and] the employers' association cannot sue [under §502]." *So. Ill. Carp. Welf. Fund v. Carp. Welf. Fund of Ill.*, 326 F.3d 919, 921-22 (7th Cir. 2003).

However, the Movants assert that the filing of the Fund's ERISA counterclaim on August 1, 2012 "provide[s] this Court discretion to award Movants their attorney fees [under] ERISA § 502(g)(1) incurred from August 1, 2012." Since the PLCA was not a counterclaim defendant, it was never a party to an "action under this subchapter [of ERISA]." As a result, it could not be eligible for an award so the fee motion should be denied with respect to the PLCA.

Michels was represented by Littler Mendelson while the PLCA and the Other Employers were represented by Akin Gump. (¶9, Levien Dec. attached to L.R. 54.3 Statement). The Movants assert that the PLCA paid all of the Akin Gump fees so the Other Employers paid nothing. (Levien, ¶¶ 9-10). Since the Other Employers paid no fees and the PLCA would have incurred the Akin Gump fees in pursuing its non-ERISA declaratory judgment claim anyway, none of the Akin Gump fees should be awarded under ERISA §502(g)(1).

II. EVEN IF THE OTHER EMPLOYERS ARE ENTITLED TO FEES, NO FEES CAN BE AWARDED AFTER THEIR VOLUNTARY DISMISSAL.

On October 21, 2014, the Other Employers were voluntarily dismissed without prejudice under Rule 41(a)(1)(A)(ii)(Ex. A). After that date, there was no pending counterclaim against any of the Other Employers and the only counterclaim defendants were the PLCA and Michels.

Since the Other Employers were no longer parties in the case and the PLCA was never a party to the counterclaim, the Akin Gump fees after October 14, 2014 cannot be awarded[1].

III. THE MOVANTS ARE NOT ENTITLED TO A FEE AWARD.

A. Fee Awards Against ERISA Plaintiffs Are Disfavored.

A fee award is available under §502(g)(1) only if the Movants prove the Fund's litigation position was neither: a) "substantially justified" nor b) taken in good faith. *Hackett v. Xerox Co. Long-Term Disab. Plan*, 355 F.Supp.2d 931, 934 (N.D. Ill. 2005) (Norgle, J.), citing, *Lowe v. McGraw-Hill Co., Inc.*, 361 F.3d 335, 339 (7th Cir. 2004). "Substantially justified" means "something more than non-frivolous, but something less than meritorious-and taken in good faith." *Id.* at 935 As this Court indicated in *Hackett*, some courts also have used a five factor test to evaluate substantial justification, and the Seventh Circuit "has indicated that whichever approach is used, the bottom line question is the same: was the losing party's position substantially justified and taken in good faith, or was that party simply out to harass its opponent?" *Id.*, quoting *Little v. Cox's Supermarkets,* 71 F.3d 637, 644 (7th Cir. 1995)

These tests will "seldom dictate an assessment of attorneys' fees against ERISA plaintiffs." *Marquardt v. No. Am. Can Corp.*, 652 F.2d 715, 720-21 (7th Cir. 1981); *United Brotherhood of Carp. & Joiners of Am. v. Endicott Ent., Inc.*, 806 F.2d 918, 923 (9th Cir. 1986); *Meredith v. Navistar Int'l Transp. Co*., 935 F.2d 126, 128 (7th Cir. 1991) (Declining to award fees against benefit claimant even though his chances of prevailing were "slim, but not hopeless"). This is because the substantive purpose of ERISA is remedial – it is designed to protect "the interests of participants in employee benefit plans and their beneficiaries," not

1 The elimination of the Akin work after October 21, 2014 results in a fee reduction of $115,100 at the hourly rates requested by Akin and $64,805 at the lower hourly rate advocated by the Fund (Madden, ¶8, Ex. B).

employers. 29 U.S.C. § 1001(b); *Starr v. Metro Syst., Inc.*, 461 F.3d 1036, 1040 (8th Cir. 2006) ("A district court considering a motion for attorney's fees under ERISA should…apply its discretion consistent with the purposes of ERISA, those purposes being to protect employee rights and to secure effective access to federal courts.")

ERISA imposes fiduciary duties on the Trustees to both collect all contributions owed to the Fund and to make the beneficiaries aware of their entitlement. *Cent. States, Se. & Sw. Areas Pension Fund v. Cent. Transport, Inc.*, 472 U.S. 559, 572-74, 105 S.Ct. 2833 (1985). Further, §515 was added to ERISA to foster Trustee actions to collect contributions. *Cent. States Se. & Sw. Areas Pension Fund v. Gerber Truck Service, Inc.,* 870 F.2d 1148 (7th Cir. 1989). Thus, it is highly relevant to the determination of whether a fee award is appropriate that a trustee could be charged with a breach of fiduciary duty (a risk that no other ERISA plaintiff faces) for failing to take advantage of the right conferred by § 515 to initiate a lawsuit to collect contributions. If a fund is required to pay fees when it loses a fringe benefit contribution case, the trustees' willingness to effectively perform these fiduciary duties will be chilled by the knowledge they are exposing the fund to a potentially large fee award each time they attempt to vindicate employee rights. *Trustees of Graphic Com. Int'l Union Welfare Fund v. Bjorkedal*, 2006 WL 35111767 *17 (D. Minn. Dec. 6, 2006), aff'd 516 F.3d 719 (8th Cir. 2008), Cf., *Dorn's Transp., Inc. v. Teamsters Pen. Fund of Phil.*, 799 F.2d 45, 49 (3rd Cir. 1986) (Fee award against fund that lost withdrawal liability case "may undermine the purpose of [ERISA] and discourage plan trustees from performing their fiduciary duties, for it could deter pension plans from bringing suits to collect withdrawal liability.") Further, if a fund foregoes a close claim because it fears a fee award, the employees ERISA was enacted to protect may never receive their benefit entitlements. Cf. *Meredith*, 935 F.2d 124, 128-29 (7th Cir. 1991) ("Adherence to…ERISA's

essential remedial purpose to protect beneficiaries…often counsels against charging fees against ERISA beneficiaries since private actions by beneficiaries seeking in good faith to secure their rights…are important mechanisms for furthering ERISA's remedial purpose").

The courts have also been reluctant to award fees against a defeated fund because the culpability of a losing pension plan is different from that of a defeated employer. While a defeated employer has necessarily violated ERISA, an unsuccessful fund has not violated a federal statute, it has only been in error or unable to prove its case. *Dorn's Transp.* at 49. In addition, an employer defending against a contribution claim is not acting as an instrument for carrying out the congressional policy of strengthening plans and protecting employees, and fees are not necessary to encourage employers to resist ERISA actions. *Id.* at 48-49. Finally, a fee award against a defeated fund in contribution litigation is disfavored because "the fees would be paid out of the trust fund assets [so] individual beneficiaries would suffer a reduction in their benefits." *Chic. Painters Pen. Fund v. Karr Bros. Inc.*, 755 F.2d 1285, 1292 (7th Cir. 1985).

As a result of these considerations, which are overlooked in the Movants' brief, there is a bias against a fee award in favor of an ERISA defendant. This is not one of those rare cases where a fee award is appropriate. The Union and PLCA created doubt about whether the duty to contribute had ended because their agreements indicated the 2006 CBA was being "extended" rather than being terminated. The Trustees believed that because the 2006 CBA had been "extended" through May 31, 2012, the Union and PLCA did not have the ability to eliminate the duty to contribute to the Fund before May 31, 2012 based upon the Trust Agreement provision that required contributions for the "entire term" of the 2006 CBA. The Trustees were not seeking any personal gain; they sought to vindicate their belief that the employees of Michels and the Other Employers were entitled to pension credit and benefit accruals after November 15, 2011

consistent with their fiduciary duties. If the Trustees had not sought the contributions, the Fund faced the possibility of future benefit claims filed by employees and the Trustees faced the possibility of fiduciary breach claims asserting they had failed to pursue collection of contributions owed to the Fund and/or had assessed withdrawal liability at millions less than was actually due. The Movants representation that this case was a "complex ERISA action involving significant legal issues…[with] substantial amounts [totaling over $60 million] at stake" establishes the reasonable basis for pursuing the claim.

The fact that this court granted the Fund's summary judgment motion is powerful evidence of substantial justification because the Trustees' position "satisfied a reasonable person, namely this court." *Hackett*, 355 F.Supp.2d 934. The Movants argue that this court's analysis is largely irrelevant because this court ultimately awarded fees in *Hackett* after the Seventh Circuit reversed its grant of summary judgment to a plan.[2] *Hackett* is distinguishable – it was a benefits case where the plan terminated long-term disability payments after 12 years to a participant who suffered from both a personality disorder and depression. The benefit termination was based on a doctor's report indicating that while still "suffering from mental illness, he was capable of working," that offered no explanation for the radical departure from prior contrary medical reports. The decision to award fees in *Hackett* was a close call because the Plan's position had satisfied this court. The balance was tipped by a disabled plaintiff of likely limited means to whom the trustees owed a fiduciary duty and who was in the class protected by ERISA. Thus, the award would further the goal of encouraging plan participants to enforce their ERISA rights. On the other hand, the balance in this case is tipped by the bias against an award in favor of a group of well-healed employers who are not in a class protected by ERISA who can afford to

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2 Even if the Fund's position was arbitrary and capricious, fees can be denied. *Weitzenkamp v. Unum Life Ins. Co. of Am.*, 500 Fed. Appx. 506 (7th Cir. 2012).

pay their expensive attorneys because the award will reduce the corpus of the Trust and will discourage the Trustees from pursuing claims in the future to the detriment of Fund participants.

B. The Movants Have Not Demonstrated The Fund's Position Lacked Substantial Justification

The Movants' assertion that this was a "complex ERISA action involving significant legal issues" is fatal to the contention that the Fund's position was so lacking in merit that its defeat was a foregone conclusion. The Movants exaggerate when they assert that the Seventh Circuit opinion used "strong, indeed excoriating language . . . repeatedly and in multiple contexts throughout the opinion." This assertion is based largely on the Seventh Circuit's statement that:

> As we have previously have noted, "in some cases, the plain language or structure of the plan or simple common sense will require the court to pronounce an administrator's determination arbitrary and capricious. *Tompkins v. Central Laborers' Pension Fund*, 712 F.3d 995, 1002 (7th Cir. 2013)…This is one of those cases.

800 F.3d at 417.[3] The Movants' sole argument is that this statement was premised upon the Trustees' interpretation of Article III, Section 1 of the Trust Agreement. However, the Seventh Circuit only speculated that the Fund "evidently believe[d]" the interpretation that was thought to be arbitrary and capricious. In reality, the Fund *never* argued that Article III, Section 1 had the meaning the Seventh Circuit thought was arbitrary and capricious.

Moreover, this case did not turn on the interpretation of a plan document at all, it turned on the issue of whether the extensions of the 2006 CBA extended the 2006 CBA as the Fund contended, or merely extended the "terms" of the 2006 CBA but not the 2006 CBA itself as the Seventh Circuit concluded. This is an issue of law that relates to the extension agreements and not to "the plain language or structure of the plan." A trustee decision is arbitrary or capricious

3 The opening paragraph of the Movants' brief misrepresents this disjunctive statement by changing the second "or" to and "and," but that is not what the Seventh Circuit said.

when it is "not supported by substantial evidence or *erroneous on a question of law*." *Van Boxel v. Journal Co. Pension. Trust*, 836 F.2d 1048, 1050 (7th Cir. 1988) (emphasis added). Under the arbitrary and capricious standard, a court defers to the trustees' interpretation of plan documents, but not to the trustees' resolution of an issue of law, like the issue of whether the 2006 CBA had terminated, which is reviewed denovo. *Casey v. Uddholm*, 32 F.3d 1094, 1096 (7th Cir. 1994).

1. The Case Turned On The Issue Of Whether The 2006 CBA Continued in Effect Under The Extensions, Which Is An Issue of Law.

The Seventh Circuit aptly described the Fund's position on the central and unsettled legal issue of whether a CBA that has been "extended" remains in effect or whether an entirely new stand-alone CBA is created by the extension as follows:

> In our case, Michels's obligation to contribute is tied exclusively to the 2006 CBA. The Fund recognizes this, but it argues that the 2006 CBA did not expire until the end of May 2012. Before that, it says, the parties extended the 2006 CBA numerous times, and therefore Michels never acquired the right to withdraw. It concedes that the November 15, 2011, extension purported to eliminate the obligation to contribute to the Fund, but it says that this language was inconsistent with Article III, section 7(a) of the Trust Agreement, which provides that "a[n] employer is obliged to contribute to the Fund *for the entire term of any collective bargaining agreement accepted by the Fund* on the terms stated in that collective bargaining agreement. . . .". This language, it concludes, makes the attempted repudiation of the obligation to contribute ineffective.

800 F.3d at 418. (Emphasis original).

While the PLCA acknowledged that the "entire term" provision prohibited an employer from withdrawing before the 2006 CBA terminated, it argued that the 2006 CBA actually "terminated on January 31, 2011," so the "November 15, 2011 [Extension] Agreement is a stand-alone [collective bargaining] agreement," as were all of the prior extensions. (pp. 1, 5, 9-10 of PLCA Reply, Ex. C). Because they argued the 2006 CBA terminated on January 31, 2011, Michels and the PLCA contended the Trust Agreement's "entire term" provision did not apply.

The Seventh Circuit indicated that "we agree with [Michel's] analysis" on this issue. It indicated that PLCA gave timely notice to terminate the 2006 CBA on January 31, 2011 "so the 2006 CBA was terminated in keeping with this procedure [on January 31, 2011]." 800 F.3d at 419. It acknowledged that it was "true [the Union and PLCA] executed a series of brief extensions that had the effect of carrying forward the *terms* of the 2006 CBA, but . . . [e]ach one of these letter agreements stood on its own." (Emphasis original). *Id.* The sole support for the determination that each extension agreement was a new stand-alone CBA that only extended the "terms" of the 2006 CBA but not the 2006 CBA itself so the entire term provision of the Trust Agreement did not apply, was the NLRB decision in *Union Carbide Co.*, 190 NLRB 191 (1971). The Court recognized that *Union Carbide* arose "in a somewhat different context" of the NLRB's contract bar rule so *Union Carbide* did not definitely establish, but only "*supports the idea* that the various extensions were not merged into the 2006 CBA." 800 F.3d at 420 (emphasis added). Thus, there was no on-point authority on the central issue of whether the 2006 CBA was terminated, there was only a 44-year old NLRB decision decided in the different context of the NLRB's contract bar rule that had not been cited since 1982. While there was no authority supporting the view that an extension agreement is an entirely new agreement, there is language supporting the Fund's position in a decision which indicates that a "CBA that was to run . . . through September 21, 2007. . . remains in effect [on July 23, 2008] under a temporary extension agreement." *Gatewood v. Koch Foods of Miss., Inc.*, 569 F.Supp.2d 687, 698 (S.D. Miss. 2008).

Ultimately, the central issue related to the extensions and not to the "plain language or structure of the Plan," so this is not the element of the Fund's position that was perceived to be arbitrary or capricious. It is also significant that this court concluded that it was reasonable for the Trustees to determine that the 2006 CBA had not terminated. This Court indicated:

> Significantly, however, the bargaining parties never indicated that they were terminating the CBA; they merely sought to eliminate the duty to contribute while continuing all other terms pending further negotiations. Specifically, the document at issue states "the Parties wish to amend and extend the CBA through December 31, 2011." The document does not reference a termination of the CBA or the execution of a new collective bargaining agreement; it merely provides for a proposed amendment to and an extension of the existing CBA. Furthermore, Michels's allegation that the document was, in substance, a new collective bargaining agreement is belied by its very terms which state that "agreement on certain other issues has not been reached." *Id.* (emphasis added). Therefore, according to the bargaining parties, a new collective bargaining agreement was not possible as of November 15, 2011. Accordingly, it was reasonable for the trustees to determine that the November 15, 2011 Amendment to and Extension of the CBA was not a new collective bargaining agreement.

(Opin. at p. 14, Ex. B) (emphasis original). Thus, the Trustees' position on this issue of law "satisfied a reasonable person, namely this court." *Hackett*, 355 F.Supp.2d at 934. It would not be appropriate to award fees in a case that involves an unsettled legal issue that the Movants assert was "complex" because a fund "cannot be expected to have known exactly the strength of the legal positions favoring its interests." *Cuyamaca Meats, Inc. v. San Diego and Imperial County Butchers' and Employers Pension Fund*, 827 F.2d 491, 500 (9th Cir. 1987).

2. The Fund Never Made The Argument the That The Movants Contend Was Not Substantially Justified.

The sole argument made in the Movants' brief that the Fund's position lacked substantial justification is based upon the Seventh Circuit's discussion of the Trustees' alleged interpretation of Article III, Section 1 of the Trust Agreement which in relevant part provides:

> The obligation to make such contributions shall continue (and cannot be retroactively reduced or eliminated) after termination of the collective bargaining agreement until the date the Fund receives a) a signed contract that eliminates or reduces the duty to contribute to the Fund . . .

The Seventh Circuit indicated that "This provision could not be clearer: the obligation to contribute ends when the fund receives a signed contract that eliminates or reduces the duty to

contribute to the fund. That is exactly what the Fund received from Michels on November 16, 2011." 800 F.3d at 420. The Seventh Circuit then speculated that:

> The Fund *evidently thinks* that the "signed contract" mentioned in Article III, section 1 must be a new CBA, and that the November 15, 2011, agreement was not a new CBA. But the Trust Agreement does not require that the "signed contract" mentioned in Article III, section 2 (sic) be a CBA.

Id. at 420-21 (Emphasis added). Had the Fund made this argument, its position would have been substantially justified because it is supported by the decisions in *Cent. States Se. & Sw. Areas Pension Fund v. Indy Transport, Inc.*, 2007 WL 734389 *4 (N.D. Ill. March 6, 2007) ("The Trust Agreement's plain language indicates only one way terminate the contribution obligation: submit a new bargaining agreement for approval by the pension fund.") and *Cent. States Se. & Sw. Areas Pension Fund v. Auffenberg Ford, Inc.*, 2009 WL 2145384 *6 (N.D. Ill. July 9, 2009), aff'd on other grnds, 637 F.3d 718 (7th Cir. 2011) (same).

However, the Fund never made this argument. Instead, the Fund's sole and exclusive argument with respect to this portion of Article III, Section 1 was that it was irrelevant because the language indicates that receipt of a new contract would eliminate the obligation to contribute only "after *termination* of the collective bargaining agreement," and the 2006 CBA had been extended, not terminated. The Trustees' Minutes make clear that this was the reason they believed Article III, Section 1 did not support the Movants' argument. The Minutes indicate:

> The sentence of Article III, Section 1 of the Trust Agreement that requires a participating employer to submit written notice of termination to the Fund does not undermine the determination that [the "entire term" language of] Article III, Section 7(a) and § 3.01 of the Plan prohibit an agreement that eliminates the duty to contribute during the term of a CBA. *This sentence is irrelevant because it applies only "after termination of the collective bargaining agreement" but the PLCA was extended, not terminated.*

(pp. 26-7, ¶ 8 of Trustee findings, Ex. E) (emphasis added).

This court's opinion also recognized that the Fund's argument was that Section 1 was irrelevant because the 2006 CBA had not terminated, not that the duty to contribute could only end upon the Fund's receipt of a full CBA. After quoting Article III, Section 1 of the Trust Agreement with words "after termination" underlined this Court indicated:

> As the names indicate, the extensions did not terminate the CBA; they merely continued and extended the provisions, thereby increasing the "entire term" of the CBA with each extension. In addition, although the Amendment and Extension may have been "a signed contract that eliminates or reduces the duty to contribute to the Fund," it was entered into before the termination of the CBA, not after as required by the terms Trust Agreement. *See Cent. States, Se. & Sw. Areas Pension Fund v. Waste Mgmt. of Mich., Inc.*, 674 F.3d 630, 635-636 (7th Cir. 2012); *Cent. States, Se. & Sw. Areas Pension Fund v. Fingerle Lumber Co.*, No. 08 C 1886, 2009 WL 1137793, at *6-7 (N.D. Ill. Apr. 22, 2009). Therefore, the Court finds that it was not arbitrary and capricious for the trustees to determine that contributions were required for the "entire term" of the CBA, including all extensions of that term, until a new collective bargaining agreement was entered into in 2012.

(Opin. at p. 16, Ex. D)(emphasis original).

Consistent with the Trustees' Minutes, the Fund's sole argument in its appellate brief about Section 1 was that it did not apply because the 2006 CBA had not terminated. (pp. 40-43 of Fund's Appellate Brief, Ex. F). The Fund's brief asserted (pp. 42-43) as follows:

> [T]his language [of Article III, Section 1]. . . does not support the argument of Michels and the PLCA because an employer's duty to contribute under Article III, Section 1 can only occur "after termination of the collective bargaining agreement." Michels and the PLCA Employers ignore this requirement that the CBA must be terminated before a valid notice can be served.

At oral argument, the Fund again indicated that its sole argument about Section 1 was that it did not apply because the 2006 CBA had not terminated. (Trans. at pp.9-10, Ex. G). It cannot be said that the Fund's position was not substantially justified based upon an argument it never made.

The Movants only other lack of substantial justification argument is based upon the Seventh Circuit's statement that the cases cited by the Fund did not support its position. This is

not an uncommon occurrence in judicial opinions. Moreover, the Court of Appeals belief was based upon its determination the 2006 CBA terminated in January 2011. If it hadn't terminated as the Fund claimed, the Fund reasonably claimed the cases were supportive and this court's citation of the cases (pp. 16-7, Opin., Ex. D) establishes that the Fund's claim was reasonable.

3. The Movants Have Not Demonstrated Bad Faith.

The Movants argue that bad faith is demonstrated by the alleged weakness of the Fund's argument. However, "substantial justification" and "bad faith" are separate factors that the Movants must prove. The Movants only other "bad faith" argument is the contention the Fund should have responded to the PLCA's string of letters beginning with on November 16, 2011 letters before January 30, 2012. As a result of this alleged delay, the Movants claim they were foreclosed from submitting "different documentation" to establish a 2011 withdrawal which they speculate after-the-fact would have reduced their withdrawal liability by $60 million. There is no evidence that the Trustees shared this suspicion about withdrawal liability. Further, the Movants do not articulate a basis for the suggestion that a third-party beneficiary fund, which is required to be operated for the sole and exclusive benefit of its participants and beneficiaries, is required drop everything it is doing in order to facilitate a withdrawal that is not in its best interest. The Movants also ignore this Court's previous rejection of their theory (Opin., p. 20, Ex. D):

> [T]he Fund has a fiduciary duty to its employee-participants, not the employers. See 29 U.S.C. § 1104(a). While the trustees are given discretion to construe the trust documents in the event of a dispute, that does not create a duty for the Fund to interpret the contract for parties who are equally bound by its provisions and represented by competent counsel.

Further, if the Fund's position had been upheld on appeal and the employers were obligated to contribute after November 15, 2011, there was nothing that could have been done to avoid the allegedly higher 2012 withdrawal liability. The November 15, 2011 Extension

extended the CBA to December 31, 2011 and the Fund's position was that the "entire term" provision would prevent a withdrawal any time before December 31, 2011 and no "different documentation" could change that obligation. A withdrawal on December 31, 2011 is treated as a 2012 withdrawal. *Parmac, Inc. v. I.A.M. Pension Fund Ben. Plan A*, 872 F.2d 1069 (D.C. Cir. 1989). So if the Fund's argument had been accepted, a 2012 withdrawal calculation was a lock since the November 15, 2011 extension went through December 31, 2011. Finally, the Movants' contention is further undermined by the fact that they did not submit "different documentation" after being notified of the Fund's position on January 30, 2012; instead, they filed suit.

C. The Movants Are Not Entitled to an Award Under the Five Factor Test.

1. Lack of Bad Faith: As indicated above, bad faith has not been shown. The Fund acted to obtain clarity with respect to the scope of its benefit obligations to the employees and the correct date for calculating withdrawal liability in order to fulfill the Trustees' fiduciary duties to those employees and all of the Fund's participants and beneficiaries.

2. Ability to Pay: An award of fees against the Fund would be unjust because it will reduce the corpus of the Fund which will ultimately injure the participants and beneficiaries ERISA was designed to protect. *Karr Brothers, Inc.*, 755 F.2d at 1292. The actuarial report submitted to the Treasury Department in September 2015 with the Fund's Rescue Plan under the Multiemployer Pension Reform Act of 2014 indicates that at the end of 2015, the Fund had projected assets of $17.9 billion but liabilities of $35.2 billion and an annual operating deficit (i.e. the difference between income and all costs including benefit payments) of over $2 billion. (pp. 5.1.9, 5.1.12 of Ex. H). With the Treasury Department's recent rejection of the Fund's Rescue Plan (Ex. I), the Fund is projected to be insolvent by 2026. (p. 5.1.12 of Ex.

G). While the well-healed Movants are correct that the Fund has the ability to pay a fee award today, the payment will inevitably reduce the payments to beneficiaries in the future.

3. Deterrence Factor: If defendant employers are faced with payment of attorneys' fees to successful plaintiffs in addition to the costs of compliance with ERISA, they will have an added incentive to comply with ERISA whereas plaintiff-pension plans are sufficiently deterred from instituting vexatious suits by the absence of personal gain and the likelihood they will have to pay their own fees and costs should they fail. *Marquardt,* 652 F.2d at 721. It is also significant that the Fund has been party to nearly 1,000 lawsuits in this District since 2003 and fees were not awarded against the Fund in *any* of these cases and there has only been one fee award against the Fund in this century in any court throughout the United States and that was in a benefits case. (Madden, ¶7, Ex. B). This track record establishes that the Fund does not file cases lacking merit and the cost of its own fees will serve as a more than adequate deterrent if any was necessary.

4. Desire to Benefit Participants/Beneficiaries Or Existence of Significant ERISA Issue: The Movants' exclusive motive was their own economic self-interest; they did not seek to benefit any plan beneficiaries or participants at all and no significant ERISA issue was decided. The case turned on the obscure labor law issue of whether a CBA extension extends the CBA or only the "terms" of the CBA which was an issue created by the PLCA's drafting.

5. Relative Merits: As indicated above, the Fund's position, although unsuccessful had merit. After all, this court granted the Fund's summary judgment motion.

IV. THE FEES REQUESTED ARE EXCESSIVE.

The party seeking attorneys' fees has the burden of proving the reasonableness of the hourly rates requested and the hours expended. *Hensley v. Eckhart*, 461 U.S. 424, 437 (1983).

A. The Requested Hours Are Excessive And Should Be Reduced.

Although not an immutable yardstick, the hours of work performed by the Fund's in-house counsel provide a helpful benchmark in determining whether the hours claimed by the Movants' counsel are reasonable. *Young v. Verizon's Bell Atlantic Cash Bal. Plan*, 783 F.Supp.2d 1031, 1038 (N.D. Ill. 2011). The Fund's attorneys devoted 493.4 hours to this case for the period covered by the Movants' request and at the market rates ranging from $210 to $350, the associated fees are $146,242. (Madden, ¶5, Ex.B).[4] The Movants make the astonishing assertion their attorneys reasonably spent 3,343.4 hours resulting in fees of $1,704,817 at hourly rates up to $884. However, the Movants' claim they have generously agreed to reduce their hours to 1,438.3 (still almost 3 times the Fund's hours) and their hourly rates to a $700 maximum resulting in a fee of $744,551 (still almost 5 times the Fund's fees). The Movants fail to mention that $417,437.51 of their reduction (875.6 hours) related to time *before* the Fund's ERISA counterclaim was filed so it wasn't eligible for reimbursement at all and $58,851.87 was incurred after the Seventh Circuit decision which the Movants' brief claims they will seek later (p.15, fn.6). They also fail to mention that their bloated $1.7 figure included time for no less than 37 different billers and included items such as $162,000 related to the preparation of the PLCA's motion to intervene and Complaint that is largely a copy of Michels' complaint and $62,000 associated with the preparation for the PLCA's 3 minute appellate argument. (Madden, ¶9, Ex.B). The Movants' recognition that their initial demand was grossly overstated and could not be sustained provides no support for their current excessive demand.

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4 The Movants brief asserts that the Fund's fees were $189,193. This figure was correct for the period from March 2012 through March 2016. However, the Movants' request eliminates all hours prior to August 1, 2012 and Akin hours after September 2, 2015. As a the Fund has eliminated its 138.1 hours for those periods so there is an "apple to apples" comparison.

The Movants' revised demand breaks down to 705.65 hours for Littler at rates ranging from $325 to $700 resulting in fees of $345,590.75 and 733.1 hours for Akin at rates between $493 and $700 resulting in fees of $398,960.40. The Fund maintains the Movants' hours should be reduced to not more than 1,000 hours (still twice the Fund's hours) and rates to $185 to $375 resulting in fees of not more than $282,788. In addition, the Fund maintains that the Akin hours should be further reduced if the court agrees with the Fund's contention that the 230.8 hours after the October 21, 2014 dismissal of the Other Employers should be eliminated leaving no more than 773.2 hours and total fees of no more than $214,515.50.

The court should reject the Movants' conclusory contention that their additional hours were justified because they were required to "spend time understanding the Fund's processes and practices, conducting fact investigations and identifying and addressing all the claims and defenses that were unique to 34 clients involved in the case" due its utter lack of any specifics. Moreover, the claim has no merit. This case was *started* by Michels and the PLCA and the initial fee demand submitted to the Fund claimed their attorneys had amassed 875.6 hours *before* the August 1, 2012 filing of the Counterclaim (Madden, ¶6, Ex.B), none of which are included in the current demand. It is not credible for the Movants to assert they were as clueless as they claim after their attorneys had already devoted 875.6 hours to the case. After all, the Movants' attorneys claim to be experts (and they are demanding exorbitant hourly rates), and if that is true, their expertise should have enabled them to complete litigation tasks in an extremely efficient manner. Moreover, all of the facts were known and undisputed, there was no discovery at all and the case was resolved on cross-motions for summary judgment based upon the administrative record presented to the Trustees. The contention that the Akin hours were compounded by the need to investigate the claims and defenses that were unique to the PLCA and 33 employers is

belied by the fact there was a joint Answer filed by the Other Employers that was virtually identical to the Answer filed by Michels and no defense other than that argued by Michels was ever identified. The Movants also assert that the excessive Akin hours were caused by the need to communicate with the individual employers but while the Akin fee schedule often fails to always identify who participated in telephone calls and conferences, it is clear that most were attorney calls and conferences.

The Akin fee request also warrants particular scrutiny because the fees were paid by the PLCA and the Managing Director and General Counsel of the PLCA is also an Akin partner (Ex. O). *Allied Computer Repair, Inc.*, 202 B.R. 877, 882 (Bk. W.D. Ky, 1990) (Fee petition deserves "particularly close scrutiny" when bankruptcy trustee hires the law firm where he works). Even though none of the Akin clients participated in the summary judgment briefing, and their only substantive pleading in the district court was the joint Answer of the Other Employers to the Counterclaim that was a virtual copy of Michels' Answer, the Akin firm claims to have spent more hours on the case in the district court than either the Fund or Michels.

The PLCA also seeks $111,180 for its appellate work. Because the PLCA did not participate in the summary judgment briefing, it could not raise issues not addressed in Michels' appellate briefs. The PLCA's reply brief reorganized this limitation indicating that "the PLCA does not raise an argument not raised by Michels in the district court . . . [t]he PLCA simply cites additional authority to support this position [of Michels]" (p.14 of Ex.C). This is not a legitimate excuse for this work so the 198 alleged hours of Akin appellate work should be eliminated (leaving not more than 802 hours for the Movants), which results in a fee reduction of $111,180 fee reduction at the Movants' rates and a $62,265 fee reduction at the Fund's rates. (¶8, Ex. B).

B. The Hourly Rates Are Excessive.

The Akin firm rates are for Washington, D.C. attorneys and the rates for one of Michels' attorneys (Susan Katz Hoffman) are Philadelphia rates (Ex. P). In *Jeffboat, LLC v. OWCP*, 553 F.3d 487, 490 (7th Cir. 2009), the court indicated that the market rate might be the local rate or the rate of all practitioners in an area where "the subject matter of the litigation is one where the attorneys practicing in it are highly specialized and the market for legal services in that area is a national market." However, no effort has been made to show that fringe benefit contribution defense work is highly specialized or that there is a national market for legal services in the area. Further, *Jeffboat LLC* indicates that even if there is a specialized and national market, local rates can be used if local counsel could have provided "comparably effective legal services." Clearly, there are many Chicago attorneys that could have handled this litigation at more reasonable rates.

There has not been a fee award against the Fund in a contribution case since at least 1985 but there have been hundreds of awards in favor of the Fund in contribution cases since an award is mandatory any time the Fund prevails. 29 U.S.C. §1132(g)(2). (Madden, ¶4, Ex.B). Thus, the Fund has a powerful incentive to make sure it is charging market rates. In the long run, the Fund would benefit from a determination that the rates sought by the Movants are market rates so that it can seek higher rates in future fee requests, but Movants rates are not market rates. There are numerous decisions and orders adopting the Fund's rates as the market rate. *Cent. States, Se. & Sw. Areas Pension Fund v. Waste Mngmt. of Mich., Inc.*, Case No. 10-3286 (7th Cir. April 2, 2012) ($195-$325) (Ex. J)[5]; *Cent. States, Se. & Sw. Areas Pension Fund v. Auffenberg Ford, Inc.*, Case No. 09-2964 (7th Cir. April 20, 2011) (Ex. K) ($170-$300); *Cent. States Se. & Sw.*

5 Waste Management was represented by Littler attorneys Susan Hoffman and Michael Congiu who claim hourly rates up to $700 in this case. If those rates had been used, the Fund's $105,466 fee recovery in Waste Management (Madden, ¶7, Ex. B) would have doubled.

Areas Pension Fund v. Allied Syst., Inc., 10 C 3718 (N.D. Ill. Aug. 15, 2011) ($170-$325)(Ex.L); *Cent. States, Se. & Sw. Areas Pension Fund v. Blue Sky Heavy Haul., Inc.*, Case No. 08 C 3338 (N.D. Ill. July 27, 2011) ($170-$325) (Ex. M); *Cent. States, Se. & Sw. Areas Pension Fund v. Kabbes*, No. 02 C 1809 (N.D. Ill. Dec. 9, 2004)($140-$250) (Ex. N)(Norgle, J.). In *Chicago Reg. Council of Carp. Pen. Fund v. Bryn Mawr Flooring*, 2016 WL 110004 (N.D. Ill. Jan. 11, 2016), the court surveyed hourly rates in numerous delinquent contribution litigation cases and indicated: "As a matter of law, the Northern District of Illinois has recognized that hourly rates of $175 per hour to $250 per hour are reasonable rates for attorney time for ERISA litigation." The Fund's rates also consistent with rates in other districts. See eg., *Bay Area Painters & Tapers Pen. Trust Fund v. Ibarra Coatings, Inc.*, 2011 WL 6056462 (N.D. Ca. Nov. 1, 2011)($195-$205); *Ferrara v. Oakfield Leasing, Inc.*, 904 F.Supp. 2d 249, 254 (E.D. N.Y. 2012)(surveying cases and ordering resubmission of fee petition at $350 partner rate, $275 senior associate rate and $225 junior associate rate); *Triumph Const. Co. v. New York City Council of Carp. Pension Fund*, 2014 WL 6879851 (S.D. N.Y. Dec. 8, 2014) (surveying case approving rates between $300 and $425). The Movants do not cite a single case from this or any other district that comes close to their rates in a fringe benefit contribution case. They only cite only two ERISA rate cases that are distinguishable because they were both class action benefit cases.

CONCLUSION

The Movant's Motion should be denied in its entirety or at a minimum, the Akin fee request should be denied entirely. Alternatively, it the court determines an award is appropriate, the court should adjust the hours and/or rates so that an award does not exceed $282,788 and if the court agrees the Akin hours after October 21, 2014 (or the Akin appellate court hours) should be eliminated, the award should not exceed $214,515.50.

Respectfully submitted,

/s/ Albert M. Madden

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CERTIFICATE OF SERVICE

I, Albert M. Madden, one of the attorneys for the Central States, Southeast and Southwest Areas Pension Fund, Certify that on May 24, 2016, I electronically filed the foregoing *Memorandum In Opposition To Motion For Attorneys' Fees* with the Clerk of the Court using the ECF system. This filing was served on all parties indicated on the electronic filing receipt via the ECF system.

*/s/ Albert M. Madden*__________________________
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